91-344

No. _____

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In The

Supreme Court Of The United States

October Term, 1991

BRIDGEPORT POLICE FOR EQUAL EMPLOYMENT OPPORTUNITY, INC., ET AL,
Intervening Defendants-Appellants/Cross-Appellants – Petitioners

v.

BRIDGEPORT GUARDIANS, INC., ET AL,
Plaintiffs-Appellees
and
CITY OF BRIDGEPORT, ET AL,
Defendants-Appellants/Cross-Appellants – Respondents

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

May a Title VII plaintiff make a prima facie case by showing disparate impact in mean exam scores when employer decisions in reliance on actual test results did not produce significant disparate impact?

LIST OF ALL PARTIES

Bridgeport Police For Equal Employment Opportunity, Inc., Thomas Flynn, Richard Herlihy, Louis Piccirillo, Michael Kirwin, Joseph Santillo, William Heckley, John Evans, Orlando Lanzante, Mark Graham, Robert Martin, Adam Radzimirski, Thomas Lula, Robert Craw, Louise Karioli, Vincent Verillo, John Cueto, Brian McCarthy, James Viadero, John Kennedy, Paul Nicola, William Mayer, Paul Wargo, John Losak, Robert Blanchard, Kevin Zwierlein, John Carraro, Michael Bavco, William Humber, Anthony Armeno, Michael Killian, Bob Gearing, Robert Halpin, Nick Merriano, Frank D'Amore, Lynn DeSarli, Ray Sherwood, Robert Christy, Bruce Belco and Eugene O'Neill,

Intervening Defendants-Appellants/Cross-Appellees – Petitioners

v.

Bridgeport Guardians, Inc., Hispanic Society, Inc., Jerry Brown, Johnny Devone, Angel Duran, Pedro Garcia, Roberto Melendez, Jesus Ortiz, Armando Perez, Luis Santana, Carwin Spearman and Nina Thomas,

Plaintiffs-Appellees,

and

City of Bridgeport, Bridgeport Police Department and Bridgeport Civil Service Commission,

Defendants-Appellants/Cross-Appellees, – Respondents

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Bridgeport Guardians, Inc. v. City of Bridgeport, 735 F.Supp. 1126 (D. Conn. 1990), *aff'd*, 933 F.2d 1140 (2d Cir. 1991).

STATEMENT OF JURISDICTIONAL GROUNDS

The decision of the United States Court of Appeals for the Second Circuit entered May 28, 1991. The statutory provision believed to confer upon this Court jurisdiction to review the judgment by writ of certiorari is 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

TITLE VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000-2(a), provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer –
>
> (2) to limit, segregate or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, be-

cause of such individual's race, color, religion, sex or national origin.

Section 2000e-2(h) provides in pertinent part:

Notwithstanding any other provisions of this subchapter [of Title VII], it shall not be an unlawful employment practice . . . for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

STATEMENT OF THE CASE

This is a Title VII action arising out of alleged discrimination in promotions. The Bridgeport Guardians, Inc., and Hispanic Society, Inc., organizations of minority officers in the Bridgeport, Connecticut police department (collectively "Guardians"), together with some of their members, brought suit in the United States District Court for the District of Connecticut to enjoin the City from using the results of the 1989 sergeant's exam. The Bridgeport City Charter requires promotion in rank order from a list based on exam scores. Although the City had not made any promotions when suit was brought, and the test had been developed at great expense under court supervision by a prominent expert, Dr. James Outtz, of Washington, D.C., the candidates at the very top of the list were White and the Guardians feared that only they would be promoted.

The District Court, Hon. T. F. Gilroy Daly, temporarily restrained the City from making promotions, consolidated the preliminary injunction hearing with the trial and allowed petitioner Bridgeport Police for Equal Employment Opportunity, Inc., an organization of non-minority officers on the list, and some of its members to intervene to protect their right to promotional opportunity.

Although the Guardians had pled intentional discrimination, their principal argument at trial was that the exam had a disparate impact on minority candidates and was not job related. A professor of statistics with no testing background testified for the Guardians that a racial breakdown of mean test scores, taken as a whole without regard to the rate at which candidates would be selected for promotion, showed gross differences. One hundred and seventy officers took the test. One hundred and fifteen were White, 27 were Black and 28 were Hispanic. Ninety-nine candidates passed the exam. Seventy-eight were White, 8 were Black and 13 were Hispanic. Sixty-eight percent of the White candidates passed, 30% of the Black candidates passed and 46% of the Hispanic

candidates passed. Another expert for the Guardians then testified that the exam had not been properly validated and was not job related.

Dr. Outtz and Dr. John Veres, from Auburn University, defended the exam. Unlike the Guardians' statistician, both Dr. Outtz and Dr. Veres were experts in municipal employment testing. Drs. Outtz and Veres insisted that the Guardians had not proved disparate impact by statistically significant differences in rate of actual selection. The Guardians' expert had ignored the fact that only the top 39 candidates had any chance of being promoted during the two year life of the list. The City would certainly promote 25 candidates. It might promote between 7 and 14 more. Dr. Veres showed by the Fisher Exact test, which the Guardians' expert acknowledged accurate, that if the City made 25, 32 or 39 promotions there would be no significantly significant disparity in the rates of appointment of Whites, Blacks and Hispanics.

The District Court agreed with Drs. Outtz and Veres that the City would promote between 25 and 39 candidates and that there would be no disparate impact in selection rate at those levels. It nevertheless held that it had discretion to find disparate impact from differences in mean scores alone. This finding triggered the City's obligation to validate the exam.

The City met its burden. The District Court found the exam valid and job related. The court nevertheless found that banding, a method of grouping candidates with no material difference between their test scores, was as effective in meeting the City's needs and might well be less discriminatory than promotion in order of test results. It therefore held for the Guardians and ordered the City to band the list.

The City and the intervenors appealed. The Guardians had not made a prima facie case. This Court had consistently required plaintiffs to show that the exam under attack had caused actual differences in selection rate. The Guardians

called appellants' argument the forbidden "bottom line" defense. The City and the intervenors replied that the Guardians' argument created conflict with this Court's disparate impact decisions.

The Court of Appeals affirmed. Although it acknowledged that disparate impact is shown by significant differences in selection rate, it held, relying on *Connecticut v. Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed. 2d 130 (1981), that the Guardians had made out a prima facie case by showing that the list was based on exam scores which showed disparate impact even though there would be no disparity in actual selection rate. The court did not address the conflict between this reading of *Teal* and this Court's other disparate impact cases. This petition for certiorari followed.

ARGUMENT

There are two reasons why the decision of the Court of Appeals should be reviewed on writ of certiorari. The first is that the Court of Appeals misread *Teal* to create a disparate impact test for exam cases which varies from the test enunciated in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed. 2d 733 (1989) and *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 994-95 108 S.Ct. 2777, 101 L.Ed. 2d 827 (1988). The second is that the Court of Appeals, again relying on *Teal*, stretched the inference of discrimination arising from disparate impact to the point where it has no probative value. The practical effect of these interpretations of *Teal* will be, as the dissenters in that case, Chief Justice Burger and Justices Powell, O'Connor and Rhenquist, feared, to force municipal employers to resort to quotas to avoid litigation. Certiorari should be granted to limit and clarify *Teal*.

The Court of Appeals distorted the concept of disparate impact. Proof of disparate impact is not fundamentally different than proof of intentional discrimination. The plaintiff

shows that the device in question is the functional equivalent of intentional discrimination. *Watson*, 487 U.S. at 987. It is the functional equivalent because the decisions of the employer in reliance on the device favor white over minority candidates. This is the uniform approach of this Court's cases on disparate impact. *See Teal*, 457 U.S. at 458-59 (Powell, J., dissenting) (referring to "selection process"); *Washington v. Davis*, 426 U.S. 229, 234-35 96 S.Ct. 2040, 48 L.Ed. 2d 597 (1976) (the test in question "screened out" candidates for employment); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 95 S.Ct. 2362, 45 L.Ed. 2d 280 (1975) (tests "select" applicants); *Griggs v. Duke Power Co.*, 401 U.S. 424, 426-27 (1971) 91 S.Ct. 849, 28 L.Ed. 2d 158 (employer made satisfactory scores on test a condition of employment or transfer). The emphasis on employer decisions is marked in *Wards Cove*, 490 U.S. at 652-53 and in *Watson*, 487 U.S. at 994-95 (discussing cases). The EEOC interprets disparate impact in this way. The Uniform Guidelines on Employee Selection Procedures, which are entitled to great deference by the courts, *Albemarle*, 422 U.S., at 431, define "Adverse Impact" as "A substantially different *rate of selection* in hiring, promotion or other *employment decision* which works to the disadvantage of members of a race, sex or ethnic group." 29 C.F.R. Sec. 1607.16A (1978) (emphasis added); *accord*, Adoption of Questions and Answers To Clarify And Provide A Common Interpretation Of The Uniform Guidelines On Employee Selection Procedures, Questions & Answers 10-12, 44 Fed. Reg. 11, 966, *et seq.* (1978). Industrial psychologists agree. *See e.g.*, D. Baldus & A. Cole, *Statistical Proof of Discrimination* 106-08 (1980 & 1987 Cum. Supp. at 54) (noting preference for data based on selection rate from applicant flow).

Teal neither requires nor justifies the Court of Appeals' refusal to consider selection rate. *Teal* held that an employer who had screened out most minority applicants with a pass/fail test could not avoid a finding of disparate impact, at least against the excluded group, by pointing to "bottom line" racial equality achieved by promoting a disproportionate number of successful minority applicants. 457 U.S. at 454-56.

But the exam given by the City was not pass/fail. The written test in *Teal* determined the outcome of the selection process for those who failed it. *Teal* may therefore require separate disparate impact analyses of pass/fail exam components and overall test results. *See, e.g., Waisome v. Port Authority of New York & New Jersey*, 758 F.Supp. 171, 176 (S.D.N.Y. 1991). But this does not translate into a rule that disparities in mean scores, on the exam as a whole or on its components, must be examined for disparate impact when, as here, there is no disparate impact in actual selection rate. Nor is the City justifying discrimination against individuals by favorable treatment of the group to which they belong; the "bottom line" defense. *See Teal;* 457 U.S. at 45. The District Court found that use of the results of Dr. Outtz's exam in strict rank order to select candidates would not produce disparate impact. The City did not rely on affirmative action to cure disparate impact.

There is no conflict between *Teal* and *Watson* and *Wards Cove* if *Teal* is limited to cases where there are pass/fail test components, or where favoritism used to cover up discrimination, or where bottom line racial balance is raised in defense of specific discriminatory practices. *See Wards Cove*, 490 U.S. at 653 & n.8. *Teal* should not be read, however, to eliminate the role of selection rate. The approach taken by the Court of Appeals creates a dangerous conflict between this Court's decisions on disparate impact.

The Court of Appeals decision also disregards the limits on disparate impact as a method of proof. As the dissent in *Teal* noted, 457 U.S. at 457-60, proof of disparate impact on a group is an acceptable way to show discrimination because it creates an inference of discrimination against individuals. This burden of proof is not light. After *Wards Cove* a plaintiff needs precise proof of a high level of disparate impact to make a prima facie case. Player, *Is Griggs Dead? Reflecting (Fearfully) on Wards Cove Packing Co. v. Atonio*, 17 Fla. St. L. Rev. 1, 45 (1989). The amount of evidence necessary to prove discrimination in a disparate impact case is not less than that

required in disparate treatment cases. *See Watson*, 487 U.S. at 987. The Court of Appeals approach to *Teal*, however, allows the inference that the employer has passed over minority candidates for promotion from differences in mean scores which had no effect on actual selection decisions. The Court of Appeals thus held that individuals could make a prima facie case without showing any disparate impact on the group to which they belong.

The problems posed by the Court of Appeals' misreading of *Teal* are not merely theoretical. Title VII should not be read to deter employers, particularly local governments with limited funds, from using ability tests. *Teal*, 457 U.S. at 463-64 (Powell, J., dissenting). Employers should not be forced to use quotas to avoid liability. *Watson*, 487 U.S. at 988-89. The right to use professionally developed ability tests is guaranteed by Section 703(h) of Title VII, 42 U.S.C. Sec. 2000e-2(h). The City here spent thousands of dollars to get a valid test. No part of the test was pass/fail. The hiring decisions based on the test results did not show significant disparate impact. The City was nevertheless held liable.

CONCLUSION

For all of the foregoing reasons petitioners respectfully request that their petition for certiorari be granted.

THE PETITIONERS
BRIDGEPORT POLICE FOR
EQUAL EMPLOYMENT
OPPORTUNITY, INC., ET AL

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX TO PETITION FOR CERTIORARI

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BRIDGEPORT GUARDIANS, INC., HISPANIC SOCIETY, INC., JERRY BROWN, JOHNNY DEVONE, ANGEL DURAN, PEDRO GARCIA, ROBERTO MELENDEZ, JESUS ORTIZ ARMANDO, CARWIN SPEARMAN, NINA THOMAS, Plaintiffs.	)	Civil No. B-89-547 (TFGD)
v.	)	
CITY OF BRIDGEPORT, BRIDGEPORT POLICE DEPARTMENT, and BRIDGEPORT CIVIL SERVICE COMMISSION. Defendants.	)	

MEMORANDUM OF DECISION

In this action plaintiffs claim that the defendants are using a racially discriminatory selection process for the promotion of police officers to the rank of sergeant in the Bridgeport Police Department. Plaintiffs allege that defendants' promotion procedures violate sections 1981 and 1983 of Title 42 of the United States Code and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). The parties having fully briefed the legal and factual issues raised at the consolidated preliminary injunction hearing and trial, this matter is now ready for decision.

FINDINGS OF FACT

Plaintiffs are individual Black and Hispanic candidates for the position of police sergeant who took the 1989 Bridge-

port Police Sergeant's Examination, and two organizations of minority police officers, the Bridgeport Guardians and the Hispanic Society. They initiated this action on October 2, 1989 seeking a temporary restraining order and preliminary and permanent injunctive relief. The defendants are the City of Bridgeport, the Bridgeport Police Department, and the Bridgeport Civil Service Commission (the "Commission"). On November 15, 1989, the Court allowed thirty-nine individual White police officers and an organization of such officers, the Bridgeport Police for Equal Employment Opportunity, Inc., to intervene as defendants in this matter (the "intervening defendants").

On October 2, 1989, the Court issued a temporary restraining order prohibiting the defendants from making any promotions from the eligibility list drawn up after the completion of the promotion testing and appeals period. On the consent of the parties, the temporary restraining order remains in effect pending this decision. A consolidated trial and preliminary injunction hearing was held on December 27 and 28, 1989.

On February 6, 1989, the Commission announced that it would conduct a promotional examination for the rank of sergeant. The examination notice stated that the Commission required that candidates had served as police officers and/or detectives for one year immediately preceding February 3, 1988, be bona fide residents of the City of Bridgeport[1], and have "one year of satisfactory experience as a police offi-

[1] During the trial there was some dispute about whether certain officers had met this requirement. The defendants offered evidence that the Commission requested and received verification from the defendant police department that all of the candidates were residents of the City of Bridgeport. After the examination was completed, certain candidates complained about, and on October 13, 1989 the Commission asked Mayor Bucci to have the Office of Internal Affairs investigate, the residency of four individuals. At the time of trial, that investigation was still ongoing. Without any evidence of its results and without any substantial basis for concluding to the contrary, on the basis of the present record the Court deems those four officers to be residents of Bridgeport.

cer immediately preceding February 3, 1988"[2]. Dr. James Outtz, an industrial psychologist and testing expert who previously developed the 1983 Bridgeport Police Sergeant's Examination, was retained to construct the 1989 examination. As a result of the process he developed, a candidate's ranking, for promotion purposes, is based on the following three components: 1) the written examination score – accounting for fifty-three percent of one's total score; 2) the oral examination score – accounting for forty-two percent of an applicant's total score; and 3) seniority – accounting for the remaining five percent.

In the course of developing an examination, in November 1988 Dr. Outtz recommended to the defendants that video simulations be used in place of an oral test in order to improve the examination and reduce the possibility of adverse impact. To encourage the defendants to accept this proposal, he offered to defer his fee until July, 1989.[3] Despite Outtz's recommendation and the efforts of the Commission personnel director to convince Bridgeport Mayor Thomas Bucci to adopt the video simulations concept, the Mayor's office, while appar-

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[2] This requisite has been referred to as an officer's "service rating." On a pass/fail basis each candidate's service rating was reviewed by his or her commanding officer. Though plaintiffs contend that Officers Christy and Halpin should have been given negative service ratings and offered evidence via Superintendent Izzo that they were previously disciplined in connection with an incident of alleged brutality, this incident is not claimed to have occurred within the time frame for which the service rating was given. Additionally, plaintiffs offered evidence that in June 1987 a supervisor expressed concern about Officer Christy's progress after that incident. Though this came within the one-year period "preceding February 1988", defendants argue that it was not within the one-year period prior to the exam that the Commission intended to apply with respect to the service rating and also that the letter expressing concern need not necessarily have led to a negative service rating. The Court finds these arguments persuasive and finds that there is no evidence that the service ratings given were improper or intentionally or negligently manipulated for promotion purposes.

[3] The examination ultimately used by the defendants cost between $40,000 and $50,000. The use of the video simulations would have required an additional $46,000 expenditure.

ently not opposed to the concept in principle, rejected the request to provide *additional* funds for this proposal and directed the Commission to expend such funds from its own budget to whatever extent it saw fit.

The testimony of Cesar Batalla indicated that in reality the Commission had sufficient funding in its "Special Services" budget (out of which testing costs are normally paid) to pay for the video simulations. Batalla testified that in the 1988-89 fiscal year the Special Services budget had a surplus of $110,000. Though the Commission claims not to have learned of this extra funding until a May 1989 audit turned up an extra $100,000 in the Special Services budget, the Court finds this explanation less than satisfactory. Moreover, regardless of any such confusion about such additional funds, the Commission had available in the Special Services budget large balances of funds (perhaps already committed to other projects) from October 1988 through May 1989. Although the Commission supported the use of the video simulations in attempting to get Mayor Bucci to authorize additional funds for the Special Services budget, for some undisclosed reason it was unwilling to spend any portion of the large balance of funds actually in that budget for that same purpose.

The written examination was administered on April 1, 1989, and the oral examinations were conducted over a three-day period during June 13-15, 1989. One hundred and seventy candidates took the examination, of whom one hundred and fifteen are White, twenty-seven are Black, and twenty-eight are Hispanic.[4] After the Commission reviewed appeals, on October 11, 1989 it prepared a pass list[5] for selecting candi-

[4] There was some dispute at trial about whether Officer James Viadero should be treated as White or Hispanic for purposes of promotion. Viadero has intervened as a defendant in this action and stated in an affidavit in support of the motion to intervene that his color and race is White. The Court finds, based on Viadero's testimony that all four of his grandparents came from Spain, that he is Hispanic. *See* 29 C.F.R. § 1607.4B ("Hispanic [includes] persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race").

[5] For purposes of creating the pass list, the passing point was established to be seventy percent of the highest grade.

dates for promotion. The first nineteen candidates listed are White. The Black candidate with the highest score is ranked twentieth. The Hispanic candidate with the highest score is ranked twenty-second. Of the ninety-nine candidates who passed the examination, seventy-eight are White, eight are Black, and thirteen are Hispanic. Of the seventy-one candidates who failed the examination, thirty-seven are White, nineteen are Black, and fifteen are Hispanic. Thus, sixty-eight percent of the White candidates passed the examination, while thirty percent of the Black candidates and forty-six percent of the Hispanic candidates passed. The defendants presently intend to promote the first twenty-five persons from the promotion eligibility list at the conclusion of this litigation. Over the course of the two-year period that the list will remain in effect, the defendants anticipate making seven to fourteen additional promotions.

On August 15, 1989, Dr. Outtz recommended in writing that the Commission use "banding" in making promotions from the pass list rather than promoting in "strict rank-ordered fashion" in recognition of the fact "that certain differences in test scores may not be significant." Plf. Exh. 4. Based on that premise, the banding technique selects a range of scores whose differences are not statistically significant and then provides for promotions from a band range, considering matters such as race or ethnicity, gender, work experience, past job dependability, and other factors that the hiring authorities deem pertinent and worthy of consideration. Outtz stated in his August 15, 1989 letter that the tests he developed "cannot be justified as valid for the specific use of strict rank ordering." *Id.* At trial, however, Outtz testified that his letter should not be construed as an admission of adverse impact because he regularly recommends banding to make the test procedure as valid as possible. On August 16, 1989, the Commission voted (with four members present) two to zero to use banding for promotion purposes. On August 21, 1989, the full Commission revisited the issue and voted three to two to promote in strict rank order. Commission Chairman John Fabrizi testified at trial that if the examination or selection procedure had a disparate impact on minority candidates or otherwise

violated equal employment laws, he would vote to use banding. He further testified that when he cast his vote against banding on the second occasion he and the Commission had not reviewed any analysis of the test results to determine if there was a disparate impact on minority groups.

The Court's remaining findings of facts are incorporated in its discussion concerning its conclusions of law and primarily in its discussion of whether the plaintiffs have succeeded in proving their disparate impact claim.

CONCLUSIONS OF LAW

A) THE TITLE VII CLAIM

Title VII of the Civil Rights Act of 1964 proscribes employer discrimination against any person with respect to hiring or the terms and conditions of employment because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). Also proscribed is the limitation, segregation or classification of employees in ways that adversely affect any employee on account of race, color, religion, sex, or national origin. *Id.* In *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), the Supreme Court held that Title VII prohibits not only intentional discrimination, but also discrimination resulting from practices which, though apparently "fair in form", are discriminatory in fact. Basing their claim on this theory of liability, plaintiffs argue that the sergeant's promotion process had a "disparate impact", *i.e.*, it adversely impacted upon minority promotion candidates.

To prove this claim, the plaintiffs' must first establish a *prima facie* case of liability by showing that the promotion disparity is the result of certain, specific aspects of the promotion process having a significantly disparate impact upon them. *Wards Cove Packing Co. v. Atonio*, ___ U.S. ___, 109 S. Ct. 2115, 2124-25 (1989); *Equal Employment Opportunity Commission v. Joint Apprentice Committee of the Joint In-*

dustry Board of the Electrical Industry, Dkt. No. 89-6165, slip op. at 1368-69 (2d Cir. Jan. 31, 1990) ("plaintiff must establish that the challenged employment practice caused the statistical disparity") *("Joint Apprentice").* If plaintiffs succeed in establishing disparate impact, then the burden of production shifts to the defendants to offer justifications for the practices at issue. *Wards Cove,* 109 S. Ct. at 2125-26. If plaintiffs are unable to prove that such practices are unjustified, then plaintiffs' claims will fail, unless they can demonstrate that alternative selection techniques (without the same undesirable disparate effect) exist that are equally as effective in meeting the employer's goals as those presently used. *Id.* at 2126-27.

1) DISPARATE IMPACT

Initially, the plaintiffs bear the burden of proving that the promotion process had a disparate impact on minorities. The parties dispute the frame of reference the Court should use in examining this issue. The defendants and intervening defendants, through the testimony of their experts, Drs. Outtz and Veres, assert that the Court should focus on the selection rates from the promotion list at the various expected levels of promotions over the next two years. Plaintiffs, through the testimony of one of their experts, Dr. Gelfand, assert in part that the Court should resolve the question of disparate impact by relying on an analysis of the entire distribution of candidates' test scores, regardless of whether they passed or failed and regardless of the rates at which different groups will be selected for promotion.

Though there is merit in both approaches, as a starting point the Court finds the latter to be more appropriate here. The analysis proposed by the defendants and intervening defendants dilutes the disparate impact evident in the entire range of exam scores by requiring specification of an arbitrary score for dividing the entire distribution of scores and in doing so ignores the information provided by examination scores falling outside the sample derived in part from the setting of

the passing score.[6] *Cf. Bushey v. New York State Civil Serv. Comm'n*, 733 F.2d 220, 224 (2d Cir. 1984) (reviewing both the distribution of minority and nonminority candidates' scores and rates at which they passed the examination at issue), *cert. denied*, 469 U.S. 1117 (1985). Moreover, the importance of reviewing the examination results as a whole is particularly significant since the examination accounts for 95% of a candidate's promotion ranking. Using the Mann-Whitney procedure to assess the relative distributions of scores of White, Black, and Hispanic candidates, plaintiffs' expert, Dr. Gelfand, demonstrated that the probability that differences in the combined scores occurred by chance in the examination scores of Whites verses Blacks was 0.0001 and in the case of Whites verses Hispanics was 0.0002. These results indicate that the differences in the distributions of scores are extremely unlikely to have occurred by chance and are statistically significant. Similar results are obtained whether one views the examination as a whole or analyzes separately its written and oral components. Thus, the Court concludes that the examination itself had a disparate impact on Black and Hispanic candidates, significantly and disproportionately reducing their promotional opportunities.

Plaintiffs also assert that the strict rank order selection procedure defendants intend to use in making promotions will cause additional disparate impact upon minorities. The competing statistical analyses offered by the defense make this contention somewhat more difficult to resolve. At present, the defendants seek to promote twenty-five candidates from the promotion list. During the two-year life of the list, between thirty-two and thirty-nine promotions are expected. Using the benchmark known as the "four-fifths" rule of the 1978 *Uniform Guidelines on Employee Selection Procedures* ("Guidelines"), 29 C.F.R. part 1607, § 1607.4(D), plaintiffs argue that an examination of selection ratios, which defendants implicitly agree gets closer to the proper focus of disparate impact anal-

[6] Stated another way, the results of the entire range of examination scores cannot be discounted away because it is primarily from such results that defendants' selection rates flow.

ysis, evidences adverse impact. As the Guidelines explain, "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact . . ." *Id.; see also Griggs,* 401 U.S. at 432 (stating that the Guidelines are entitled to "great deference"); *Guardians Ass'n of the New York City Police Dep't v. Civil Service Comm'n,* 630 F.2d 79, 88 (2d Cir. 1980), *cert. denied,* 452 U.S. 940 (1981). The regulations that establish the four-fifths rule state, however, that "[g]reater differences in selection rate[s] may not constitute adverse impact where the differences are based on small numbers and are not statistically significant . . ." 29 C.F.R. § 1607.4D; *accord NAACP v. City of Mansfield,* 866 F.2d 162, 168-69 (6th Cir. 1989) (noting that the four-fifths computation should be treated carefully when dealing with small sample sizes); *see also Clady v. County of Los Angeles,* 770 F.2d 1421, 1427 (9th Cir. 1985) (noting that four-fifths computation, or 80% rule, has been sharply criticized by some courts and commentators and used by others), *cert. denied,* 475 U.S. 1109 (1986)

In this case, the selection ratios for Blacks as opposed to Whites and for Hispanics as opposed to Whites at twenty-five, thirty-two, thirty-nine, forty-five, fifty, fifty-five, and sixty promotions indicate that strict rank order promotions will also have a substantial adverse impact upon Black and Hispanic candidates and confirm Dr. Gelfand's findings regarding the examination as a whole. The highest Black/White selection ratio at any of the promotion levels discussed above is only 45.3% at forty-five promotions. The highest Hispanic/White selection ratio at any of those same promotion levels is 39.1% at thirty-nine promotions.[7]

[7] Dr. Outtz criticized the reliance on the "four-fifths" rule in part because it considers all candidates without giving consideration to whether they passed or failed, to whether they were sufficiently qualified, motivated, or capable, and to whether they had adequately prepared. In view of this criticism, it might be argued that Dr. Barrett's selection ratio analysis overstates the disparate impact. By the Court's own calculations, however, the application of the four-fifths rule only to those ninety-nine candidates attain-

(continued)

Drs. Outtz and Veres dispute the significance of the four-fifths rule analysis relying on their own statistical analyses, respectively the Chi-square and the Fisher's exact test, to prove that no adverse impact results from the use of strict rank-ordered promotions. These analyses are persuasive. They indicate that at twenty-five, thirty-two, and thirty-nine promotions there is no evidence of disparate impact because the difference in the actual results from the expected results, when comparing promotion levels of Blacks and Whites and Hispanics and Whites, is not statistically significant.[8]

Though plaintiffs argue that these results are highly susceptible to error because the sample sizes involved are small, they ignore the utility and sensitivity of the Fisher's exact test in giving exact results, rather than the Chi-square's approximations (even when used with the Yates correction). Dr. Gelfand admitted as much. Similarly, plaintiffs' other expert Dr. Barrett, partly disagreeing with Dr. Gelfand on another point, candidly testified that the Chi-square analysis

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[7] *(continued)*
ing ranking on the promotion list, as opposed to the entire group who took the exam, yields similar results. At levels of twenty-five, thirty-two, and thirty-nine promotions, the four-fifths rule evidenced disparate impact at all levels except vis-a-vis Blacks and Whites when thirty-nine promotions are assumed. At the thirty-nine promotion level, the selection ratio for Blacks/Whites is 89%.

[8] In other words, the probability values derived from the Fisher's exact test at these various promotion levels in all instances but one exceeded 0.05 and the number of standard deviations at the same levels were always less than two. *See Castaneda v. Partida*, 430 U.S. 482, 497 n.12 (1977) (noting general rule that standard deviations greater than two or three necessarily exclude chance as a cause of underrepresentation); *see also Kirkland v. New York State Dept. of Correctional Services*, 711 F.2d 1117, 1131 n. 17 (2d Cir. 1983) (noting that the "likelihood that the actual results will fall more than one standard deviation beyond the expected results is about 32% . . . [while] [f]or more than two standard deviations, it is about 4.6% and for more than three standard deviations, it is about [0].03%.") (citation omitted), *cert. denied*, 465 U.S. 1005 (1984). At twenty-five promotions, comparing Whites and Hispanics, the difference between the expected and observed number of Hispanic promotions was within the range of statistical significance for probability values but not for the number of standard deviations.

is "particularly sensitive to small samples" and that such analysis is useful in this type of case because "it gets at the heart of the matter [by computing] the likelihood that the number of promotions is the result of random chance."[9] In light of this testimony, the inherent descriptive weakness of the four-fifths rule in the case of small samples[10], and the nature of defendants' expert testimony, the Court concludes that disparate impact has not been sufficiently proven to result from the use of strict rank ordering in promoting.[11]

2) JUSTIFICATION

Since the plaintiffs have succeeded, in part, in establishing a *prima facie* case of disparate impact, the Court must next consider whether the defendants have met their burden of producing evidence to rebut the *prima facie* case by showing that legitimate, nondiscriminatory reasons exist for the use of the examinations in question. *Joint Apprentice,* slip op. at 1371 (citing *Watson v. Fort Worth Bank and Trust,* 487 U.S.

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[9] Barrett also testified that the use of the Fisher's exact test reduces that possibility of the so-called "type II" error possibly associated with Chi-square analysis and small sample sizes.

[10] This weakness can be demonstrated by considering selection ratios at twenty-five and thirty-two promotions by way of the following example. Assume that these selection ratios will be calculated considering only those persons who passed the examination. Further assume that while the number of Blacks who passed the examination remains constant at eight, the relative ranking of two officers are switched, thereby switching the positions of the Black candidate ranked forty-fifth and the White candidate ranked twenty-third. In this instance, the selection ratios derived from comparing Blacks and Whites at twenty-five and thirty-two promotions are 89% and 108% percent respectively; neither of which is statistically significant under the four-fifths rule.

[11] Though plaintiffs take a "shotgun approach" to attacking many other parts of the examination and promotion process, in light of this Court's prior findings of fact and in view of plaintiffs' failure to offer proof regarding the specific disparate impact resulting from such other selection devices, *see Wards Cove,* 109 S. Ct. at 2125, the Court will not consider such claims to the extent they are offered to establish disparate impact. The Court, when appropriate, will consider such evidence in connection with its discussion concerning defendants' justifications for the promotion process.

977, _____, 108 S. Ct 2777, 2784 (1988)). In this phase of disparate impact analysis, the Court must review "the justifications an employer offers for [using the practice in question] and . . . the availability of alternate practices to achieve the same business ends, with less racial impact." *Wards Cove*, 109 S. Ct. at 2125. Though insubstantial justifications will not suffice to meet an employer's burden, the defendants need not show that the challenged practice is essential or indispensable for it to pass muster. *Id.* at 2126.

To facilitate this analysis, the Court will review the written and oral portions of the examination separately. The written examination, the defendants contend, arose out of the process agreed to by the plaintiff Bridgeport Guardians and approved by this Court in 1982 in connection with litigation surrounding the 1983 Bridgeport sergeant's promotional process. Prior to 1983, there were no minorities above the rank of patrolman in the Bridgeport Police Department. Today, minorities comprise 30.7% of those officers ranked as sergeants. Defendants argue that by agreeing to the 1983 process, about which no claim of discrimination has been lodged with this Court, plaintiffs are barred from challenging this examination process. *See Gilty v. City of Oak Park*, F.E.P. Cas. (BNA) 1388, 1394 (N.D. Ill. July 18, 1989) (defendant who implemented promotional process agreed upon by plaintiff as part of settlement of prior litigation has articulated legitimate business reason for using same).

This argument, though not without some illusory appeal, is entitled to little weight for the following reasons. First, it ignores the fact that, with the exception of the Bridgeport Guardians, many of the plaintiffs in this action were not parties to the November 3, 1982 consent decree. *Cf. Martin v. Wilks*, 109 S. Ct. 2180 (1989) (holding that nonparties to a consent decree resolving a Title VII case may fully challenge, beyond the narrow grounds normally available for such a collateral attack, employment decisions taken pursuant to it). Second, the consent decree specifically does not include the suggestion that the plaintiffs would not challenge the selec-

tion procedure if it disproportionately impacted upon minority candidates. Exh. 502, ¶5 (crossed-out language). Nor does the consent decree purport to restrict the ability of plaintiffs to challenge the improper development or administration of any promotional process. And finally, after its implementation, the validity of the 1983 sergeant's promotional process has never been determined in any legal proceeding.

The defendants next argue that Outtz demonstrated that the examination is both reliable and valid.[12] The written portion of the examination was developed largely from the 1983 written examination. Knowing that the Bridgeport police force had rewritten its policies and procedures in 1987 and attempting to build upon the prior written test, Dr. Outtz updated his job analysis of the knowledges needed for job success by sampling twenty-six current Bridgeport police sergeants. He factored this updated data into a chart[13] relating job duties, knowledges, skills, and abilities and then later drafted multiple choice examination questions from the six categories of documents identified as the sources for the knowledges deemed important to those officers who were sampled.

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[12] Outtz testified that reliability is an index used to measure the internal consistency of an examination. Validity refers to whether a test reasonably measures the skills needed for the job. He further stated that a reliable test is not necessarily valid.

[13] Though the Court will also discuss this chart later, a brief explanation of its utility will suffice now. On the y-axis Dr. Outtz charted the knowledges, skills, and abilities deemed sufficiently critical to the job by the subject-matter experts for the purposes of the test. A candidate's comprehension, understanding, memory, and application of the knowledge are tested for on the written component of the test. The oral test targets a candidate's skills and abilities. On the x-axis, Outtz listed various job duties that sergeants must perform deemed important by the subject-matter experts. Numerical values of average rates of importance were assigned to each knowledge, skill, ability, and job duty based on Outtz's surveys of sergeants, whether in 1983 or 1989. Then by multiplying the average importance of each knowledge, skill, and ability by the average importance of each job duty and assessing the relative weight of each product, Dr. Outtz determined the relative weights to be given to the written (knowledges) and oral portions (skills and abilities) of the examination.

Additionally, Dr. Outtz attempted to improve the 1989 process and reduce the possibility of any adverse impact by creating a study manual to assist candidates preparing for the written test. The manual consisted of open-ended questions derived from those source documents identified in the job analysis as important to job success. All of the written multiple-choice test questions were taken from questions in the study manual, given to each candidate eight weeks prior to the test. This allowed candidates to prepare themselves for the multiple-choice written test by answering the questions in the study manual.

In further attempting to produce evidence that the written portion of the examination was reliable, the defendants also offered evidence that the written examination's reliability coefficient was 0.85 for all candidates and 0.79 for minority candidates, in both instances exceeding the ranges normally deemed acceptable.

In response to defendants' assertions that the written examination was reliable and valid and that, therefore its use as one component of the promotion process is justified, plaintiffs initially contend that the job analysis and, hence, the resulting examination was flawed. This argument attacks the validity of both the oral and written portions of the test. Specifically, plaintiffs criticize Outtz for: 1) failing to update his analysis of the skills and abilities needed for the job from 1983 to 1989; 2) determining only a single average importance rating for each knowledge, skill, and ability; and 3) relying on the misleading "cross-products" obtained by multiplying the average importance of each knowledge, skill, and ability by the average importance of each job duty.

These criticisms are insubstantial. After interviewing four to five sergeants on the Bridgeport police force and developing nine sergeant's examinations for a number of municipalities, Dr. Outtz determined that the skills and abilities need for the job remained constant and decided to rely on his 1983 calculations identifying and assigning average importance

ratings to the various skills and abilities needed for the job. Other than attacking his failure to take further steps, the plaintiffs have not proven to the Court that additional skills and abilities had arisen during the intervening years or that the mean importance of the already identified skills and abilities had changed since 1983.

Similarly, the Court also finds unpersuasive plaintiffs' criticisms of Outtz's chart of job duties, knowledges, skills, and abilities. Dr. Veres testified that conducting a job analysis is an art. The Court agrees. Dr. Outtz's methodology is well within the realm of acceptability. Though plaintiffs' criticism that the cross-products distort the true relationships between certain job duties and specific knowledges, skills, or abilities is well-taken, it is of little significance because this error does not impact upon the relative weights ascribed to knowledges, skills, and abilities for purposes of determining how to weight the written and oral tests.

Through the frequently unspecific testimony of Dr. Barrett, plaintiffs also criticized the use of written examinations in general, the failure of the written test to measure a candidate's interpersonal relations and ability to integrate information, and the derivation of knowledges from some 3000 pages of material in 1983. In light of Dr. Barrett's candid admission that the written test had "some limited validity" and might be useful as an initial screening device, and because Dr. Outtz developed the study manual to focus candidates' study of knowledges needed for the test and to remove emphasis on rote memorization, the Court deems these criticisms insufficient.

Defendants also seek to justify the reliability and validity of the oral test. Each candidate who sat for the written examination was allowed to take the oral examination. For the oral assessment process, officers from other police departments who agreed to act as raters helped Dr. Outtz develop ten scenarios designed to further test a candidate's skills and abilities not measured by the written test. Before a panel of three raters each candidate was presented with the scenarios

and then asked how he or she would respond. Candidates were allotted three minutes to respond to each scenario. Each of the twenty-seven panel members had law enforcement experience and had attained the rank of sergeant or higher. None were minorities or were affiliated with the Bridgeport police department. To structure their scoring of candidates, the raters were trained beforehand and provided with a scoring key for evaluating answers. With the exception of the chairperson, panelists were also rotated to prevent the raters from becoming too accustomed to one another. To alleviate any problems resulting from disclosure of the scenarios over the course of the two and one-half day oral test period, alternative wording was used to vary the scenarios without changing their substantive content. Finally, for appeal purposes and to keep a check on the raters, candidates' responses were audiotaped.

Plaintiffs attack the oral assessments because: 1) the defendants failed to obtain minority panelists as raters; 2) the questions and answers from the oral examination panels were leaked by officers who took the examination on the first or second day and then discussed with or around those who had yet to sit for it; 3) Dr. Outtz failed to weight the answers to the oral test so as diminish the fact that certain scenarios and a candidate's responses to them accounted for a larger portion of a candidate's score than others, *e.g.*, a correct response to scenario three accounted for 16% of the test while a correct response to scenario five accounted for only 5.3% of the test score; and 4) oral examiners were allowed to collaborate in rating each candidate.

The failure to obtain minority panelists, in spite of Outtz's recommendation to do so, is disturbing. The City of Bridgeport's Affirmative Action plan requires that minorities be included on all oral panels. Exh. 36 at 42. The defendants sent letters to other departments requesting assistance in connection with the oral examination. These letters, however, did not specifically state that minority panelists were needed. Assistant Personnel Director John Colligan testified that efforts

were made to get minority raters by telephone contact with other police departments in Connecticut and New York, but that these efforts were unsuccessful largely due to the fact that the raters were requested to set aside eight days for training and development of the scenarios and for examination and grading. He further testified that the letters were sent to only those police departments who requested a written follow-up to the initial telephone contacts described above.

Though the Court finds Colligan's testimony considerably less than convincing, the question of what, if any, effect the omission of minority panelists had on the oral test scores is the Court's main focus. In this regard, Dr. Barrett testified that a thirty-four year old study supported his conclusion that the omission of minority panelists had a "chilling effect" on minorities taking the oral test. Testimony from some of the minority sergeant's candidates also indicated that they felt "intimidated" by the fact that were no minority panelists. The three officers who so testified at trial, however, scored above the nonminority mean score on the oral test.

More significant, however, are the results of Dr. Outtz's multiple regression analysis used to determine which variables, race, gender, the day the oral test was taken, or the written examination score, were most predictive of the oral test score. This analysis showed that the written score was most predictive of one's oral examination score and that the date the oral examination was taken was also of some lesser significance. The other two variables, race and gender, did not add anything to the relative predictability of the oral score. The significance of this result, as testified to by Dr. Outtz, is that candidates with higher written scores did better on the oral test, regardless of the panel before whom they appeared and regardless of their race. Though Dr. Gelfand criticized Dr. Outtz's failure to use "dummy coding" in connection with the "day of the oral exam" variable, he did not perform his own multiple regression analysis to counter Outtz's analysis. Moreover, Outtz noted that the use of scoring keys structured the rating panels to reduce the possibility that imper-

missible considerations, such as race or ethnicity, would enter into the scoring decision. Plaintiffs have failed to offer sufficient evidence to rebut such proof.

Outtz's regression analysis did show, notwithstanding Gelfand's criticism, that the day the oral examination was taken was of slight statistical significance as a predictive factor for the oral score. At trial, Officer Carwin Spearman testified that he was approached by another officer who had yet to take the oral assessment but stated that he knew all the questions on it anyway. That officer, as it turns out, failed the examination. Officer Spearman also testified that he heard several other conversations in which the oral test was discussed by unidentified other persons who had taken or were anticipating taking it. Given the results of Outtz's regression analysis, the time and financial constraints involved in obtaining twenty-seven raters to administer a half-hour oral test to one hundred and seventy candidates and then to grade such candidates, and the fact that the defendants required each candidate to sign an identification sheet forbidding disclosure of the test materials and indicating penalties for the same, the Court is not persuaded the defendants could have or realistically should be expected to prevent such talk.

Nor is the Court persuaded that the plaintiffs' remaining two criticisms of the oral test, involving weighing of the responses to the scenarios and rater collaboration, withstand the justifications offered by the defendants. The Commission, not Dr. Outtz, decided that there would no adjustment for the fact that some scenarios would account for a greater portion of the oral test score apparently to avoid the perception that candidates' scores were being unfairly adjusted after the fact. The Court also notes that the number of responses appropriate for any given scenario accounts for the reason that the scenarios are of different weight. Similarly, the Court accepts the justification offered for why the rater collaboration was allowed in scoring the oral examination. Dr. Outtz testified that he introduced this feature to reduce individual rater bias. The effect of such collaboration also was lessened by the fact

that the panelists rotated among panels. In light of the insubstantial nature of plaintiffs' criticisms and the reasons offered by the defendants for these practices, the Court finds them justified.

Accordingly, the Court holds that the justifications offered by the defendants for the use of the written and oral examination components as a part of the promotional process are convincing and such use serves, in significant fashion, the defendants' legitimate employment goals. Plaintiffs have failed to meet their burden of proving the contrary is true, in spite of the disparate impact analysis shown by Dr. Gelfand's analyses. Therefore, the Court must next consider whether alternative practices are available to achieve the same business goals, namely promoting qualified persons to the rank of sergeant, with less racial impact. *See Wards Cove*, 109 S. Ct. at 2125.

3) ALTERNATIVE SELECTION TECHNIQUES

"If [plaintiffs], having established a *prima facie* case, come forward with alternatives to [defendants'] hiring practices that reduce the racially-disparate impact of practices currently being used, and [defendants] refuse to adopt these alternatives, such a refusal would belie a claim by [defendants] that their incumbent practices are being employed for non-discriminatory reasons." *Id.* at 2126-27. In considering such alternatives, cost factors and other burdens resulting from the use of such alternatives may be relevant to the Court's determination of whether such practices would be equally as effective in serving legitimate employment goals. *Id.*

Plaintiffs propose two alternatives to reduce the combined examination scores' disparate impact. First, they contend that the defendants should have implemented the video simulations recommended by Dr. Outtz in lieu of the oral assessment procedure. The Court is not persuaded by this argument for two reasons. Outtz testified that he has typically found that, though the use of such procedures leads to a more valid ex-

amination process, typically it has not increased the relative standing of minorities on the tests with which he has been associated. Furthermore, this procedure substantially adds to the cost of the promotion process. Though it appears that the Commission had such funds to spend, perhaps unbeknownst to even itself, the cost of the video simulation would nearly have doubled the cost of the examination to the defendant City. Given such doubts about the ultimate utility of such a procedure and its relatively high cost, the Court holds that the plaintiffs have not proven that this alternative testing procedure would be equally or more effective than those actually utilized.

The second alternative procedure plaintiffs proffer is banding. Plaintiffs argue that banding will enable promotions to be made from a larger portion of the promotion list, thereby enhancing the promotion opportunities of Blacks and Hispanics. As noted previously, Dr. Outtz recommended in August 1989 that banding be used, stating that "employment tests . . . cannot be justified as valid for the specific use of strict rank ordering." During trial, Outtz backed away from that statement, testifying that because under his analysis no disparate impact had been shown, banding, while desirable and the best way to use the test results, was not needed to correct any disparate impact. Dr. Outtz further testified that banding *might* put one or two minorities in a better position to be promoted.

Defendants and intervening defendants respond that the outcome of the kind of banding Dr. Outtz proposes is unclear at best, along with the parameters of what factors should be appropriately considered for promotion within any specific band. Their experts both agree, however, that they regularly recommend banding. Defendants and the intervenors further argue that the City Charter provides that promotions shall be made according to the "rule of one" *(i.e.,* in strict rank order). *Cf. Bridgeport Firebird Society v. City of Bridgeport,* 686 F. Supp. 53, 58 (D. Conn. 1988) (noting that civil service charter provisions may not override the goals of Title VII). In

light of these uncertainties and in view of the additional burdens that implementing such a banding procedure would entail, they argue that the plaintiffs have not met their burden of showing that this alternative selection technique will reduce the adverse impact resulting from the examination while providing an equally as effective means of meeting the employer's hiring goals.

This Court disagrees. There is no evidence before the Court that any added burdens that a banding analysis would impose upon the defendants are more than minimal, either financially or temporally. While the Court accepts the proposition that rankings near the top of the promotion list indicate higher qualifications than those at the bottom of the list, lock-step reliance upon a system that promotes one person over another when the difference between their rankings is not statistically significant is unwarranted, particularly in a case where the examination that accounts for 95% of one's ranking on that list has been shown to disproportionately affect Blacks and Hispanics. Nor is the Court persuaded that uncertainty about the ultimate results of banding should preclude its implementation. Banding results in a more valid promotional procedure and may lead to the promotion of additional minorities. Finally, while it might seem anomalous to consider banding as an alternative selection device in light of the Court's conclusion that strict rank order promotions will not add to the disparate impact previously identified to have occurred, the use of banding is entirely justified to help overcome the disparate impact resulting from the examination itself. Plaintiffs have met their burden of proving that this alternative selection device will assist to offset the examination's disparate impact.

At this time, the Court is no position to mandate what type of banding procedure is appropriate. However, the Court rejects Dr. Barrett's suggestion that a separate race norm promotion process be implemented, dividing the candidates into three groups on the basis of race and ethnicity and promoting a certain percentage of top candidates within each group.

The Court's view, which the parties will be given further opportunity to influence, is that banding should take into account a number of factors not necessarily accounted for in the examination process including a candidate's past work dependability, job experience, race, ethnicity, gender, and any other factors shown to be relevant and worthy of consideration by a similar employer. Rather than promoting simply on the basis of a candidate's race or ethnicity, the Court contemplates merely that such factors are among those to be considered in promoting within a specific band. Ultimately, however, a decision regarding the most appropriate type of banding procedure, is a matter for the proceedings that will follow.

B) SECTION 1981 AND 1983 CLAIMS

Plaintiffs' complaint also alleges violations of 42 U.S.C. §§ 1981 & 1983. In their pre- and post-trial briefs, however, plaintiffs have failed to include any conclusions of law relating to such claims. Accordingly, the Court deems them abandoned and dismisses them with prejudice. Moreover, were such claims not abandoned they could not proceed here because plaintiffs have failed to prove the requisite discriminatory intent necessary to support such claims. *General Building Contractors Ass'n. Inc. v. Pennsylvania*, 458 U.S. 375, 382-91 (1982) (§ 1981); *Washington v. Davis*, 426 U.S. 229, 239-41 (1976) (fourteenth amendment).

CONCLUSION

Judgment shall enter in plaintiffs' favor on their Title VII claims to the extent of and in accordance with this opinion. Plaintiffs' remaining two claims are hereby DISMISSED with prejudice. Counsel for all parties shall submit by April 6, 1990 written proposals regarding how banding should be accomplished for the Court's review.

SO ORDERED.

Dated at Bridgeport, Connecticut this 21st day of March, 1990.

T. F. Gilroy Daly, U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 941, 942—August Term, 1990

(Argued: January 31, 1991 Decided: May 28, 1991)

Docket Nos. 90-7814, -7946

BRIDGEPORT GUARDIANS, INC., HISPANIC SOCIETY, INC., JERRY BROWN, JOHNNY DEVONE, ANGEL DURAN, PEDRO GARCIA, ROBERTO MELENDEZ, JESUS ORTIZ, ARMANDO PEREZ, LUIS SANTANA, CARWIN SPEARMAN, NINA THOMAS,

Plaintiffs-Appellees,

—v.—

CITY OF BRIDGEPORT, BRIDGEPORT POLICE DEPARTMENT, BRIDGEPORT CIVIL SERVICE COMMISSION,

Defendants-Appellants,

BRIDGEPORT POLICE FOR EQUAL EMPLOYMENT OPPORTUNITY, INC., THOMAS FLYNN, RICHARD HERLIHY, LOUIS PICCIRILLO, MICHAEL KERWIN, JOSEPH SANTILLO, WILLIAM HECKLEY, JOHN EVANS, ORLANDO LANZANTE, MARK GRAHAM, ROBERT MARTIN, ADAM RADZIMIRSKI, THOMAS LULA, ROBERT CRAW, LOUISE KARIOLI, VINCENT VERRILLO, JOHN CUETO, BRIAN MCCARTHY, JAMES VIADERO, JOHN KENNEDY, PAUL NICOLA,

BILL MAYER, PAUL WARGO, JOHN LOSAK, ROBERT BLANCHARD, KEVIN ZWIERLEIN, JOHN CARRARO, MICHAEL BAVCO, WILLIAM HUMBER, ANTHONY ARMENO, MICHAEL KILLIAN, BOB GEARING, ROBERT HALPIN, NICK MERIANO, FRANK D'AMORE, LYNN DESARLI, RAY SHERWOOD, BOB CHRISTY, BRUCE BELCO, EUGENE O'NEILL,

Intervening Defendants-Appellants.

Before:

KEARSE, PRATT, and MCLAUGHLIN,

Circuit Judges.

Appeals from a judgment of the United States District Court for the District of Connecticut, T.F. Gilroy Daly, *Judge*, enjoining strict rank-order promotion from eligibility list resulting from an examination having a disparate impact on minority candidates, in violation of 42 U.S.C. § 2000e *et seq.*, and ordering banding of examination scores and promotions of candidates from within bands. *See* 735 F. Supp. 1126 (1990).

Affirmed.

VINCENT M. MUSTO, Bridgeport, Connecticut (Koskoff, Koskoff & Bieder, P.C., Bridgeport, Connecticut, on the brief), *for Plaintiffs-Appellees.*

THOMAS K. JACKSON, Associate City Attorney, Bridgeport, Connecticut (Office of the City Attorney, Bridgeport, Connecticut, on the brief), *for Defendants-Appellants*.

WILLIAM B. BARNES, Fairfield, Connecticut (Rosenstein & Barnes, Fairfield, Connecticut, on the brief), *for Intervening Defendants-Appellants*.

KEARSE, *Circuit Judge*:

Defendants City of Bridgeport, *et al.* (collectively the "City"), and intervening defendants Bridgeport Police for Equal Employment Opportunity, Inc., *et al.* ("intervening defendants"), appeal from so much of a final judgment entered in the United States District Court for the District of Connecticut following a bench trial before T.F. Gilroy Daly, *Judge*, as granted injunctive relief to plaintiffs Bridgeport Guardians, Inc., *et al.*, on their claim of racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1988) ("Title VII"), in connection with the City's 1989 examination governing promotions to the rank of sergeant in defendant Bridgeport Police Department ("Police Department" or "Department"). The district court found that the examination had a disparate impact on minority candidates; as a remedy, it enjoined the City from filling the vacancies on a strict rank-order basis and ordered that promotions be made instead from

among candidates whose examination scores fell within given ranges. On appeal, the City and the intervening defendants contend principally that (1) the district court erred in finding that plaintiffs had established disparate impact, and (2) the remedy ordered was inappropriate. For the reasons below, we disagree and affirm the judgment of the district court.

I. BACKGROUND

The present controversy arises out of an examination conducted in the spring of 1989 ("1989 examination" or "examination") by defendant Bridgeport Civil Service Commission ("Commission") for the selection of candidates from within the Police Department for promotion to the rank of sergeant. The Commission is responsible for the preparation and administration of such promotional tests. The Department makes its promotional appointments on the basis of eligibility lists created by the Commission.

Plaintiffs are two organizations dedicated to the eradication of racial employment discrimination in the Department and 10 minority police officers who took and passed the 1989 examination. Following announcement of the scoring of the examination, plaintiffs commenced the present action, alleging, *inter alia*, that the examination did not reasonably distinguish between those who were capable of performing well as sergeants and those who were not, that the Department had 19 openings for the sergeants' positions, and that if those openings were filled by selection of candidates in order of their scores on the examination, all 19 would be filled by White candidates. Plaintiffs challenged the validity of the examination procedures in various respects, con-

tended that a rank-order selection process would have a substantial disparate impact on minorities in violation of, *inter alia*, Title VII, and sought preliminary and permanent injunctive relief. The intervening defendants are individual White police officers, and an organization of such officers, who opposed the relief requested by plaintiffs.

The district court held a consolidated preliminary injunction hearing and trial on the merits. The court's findings, reported at 735 F. Supp. 1126 (1990), and the evidence pertinent to this appeal, viewed in the light most favorable to plaintiffs, showed the following.

A. *Development of the Examination*

In February 1989, the Commission announced that it would conduct a competitive examination for promotions to the rank of police sergeant. The examination was open to police officers and police detectives who had at least one year of satisfactory employment in such a capacity by the City of Bridgeport ("Bridgeport") immediately prior to February 3, 1988, and who met the following additional requirements:

> bona fide residence in the City of Bridgeport; . . . knowledge of police department rules and regulations and of applicable laws and ordinances; considerable knowledge of modern police methods and tactics; considerable knowledge of police investigative and crime detection methods and techniques; knowledge of the laws of evidence; command ability; ability to prepare clear and comprehensive reports, keen powers of observation and memory; mental alertness; integrity; industry; resourcefulness; good judgment; physical strength and agility;

good health and freedom from disabling physical defects.

(Commission's Notice dated February 6, 1989.) The examination was to be in two parts. The score on the written portion would constitute 53% of the candidate's total score; the score on the oral portion would constitute 42% of the total score. Seniority would determine the remaining 5% of the score. The passing cutoff point was to be 70% of the highest score.

The examination had been constructed for the City during the fall of 1988 by Dr. James L. Outtz, an industrial psychologist and testing expert who had developed the police sergeants' examination used by the City in 1983. The written portion of the examination was intended to test knowledge of subjects such as substantive legal principles, the laws of evidence, correct procedures, and departmental policies. In 1988, Dr. Outtz sought updated information from incumbent officers in order to analyze the knowledge requirements in the pertinent areas. His inquiries included circulation of detailed questionnaires and review of the answers provided by 26 incumbent sergeants (half the total number in the Department).

The oral part of the examination was intended to test primarily for the requisite skills and abilities. In the course of developing the 1989 examination, Dr. Outtz recommended that the Commission use video simulations instead of some of the more traditional tests. In these simulations, crime scenes are projected onto a screen, and the candidate is asked to indicate in writing how he or she would respond to the events depicted. Though recognizing that video simulations would be more expensive than the traditional tests, Dr. Outtz

urged the substitution in order to improve the examination and to reduce the possibility of its adverse impact on minority candidates. To further encourage the City to use the simulations, he offered to defer collection of his fee until July 1989. The Commission's personnel director wrote to the Mayor of Bridgeport seeking approval of this proposal, noting that "[t]hese video components of the examination have proved to be virtually race-neutral with regard to the performance of minority groups and whites." (Letter dated November 9, 1988.) He urged the Mayor to approve funding for the simulations "[i]n view of the difficulty we have had in the past with regard to Police and Fire promotionals, with respect to challenges under Title VII." (*Id.*) He stated that though use of the simulations would involve an initial expense, "the long-term savings to the City, as well as this decent and responsible gesture of developing new methodologies to reduce any discriminatory impact will go a long way towards our City's reputation as an employer." (*Id.*)

These efforts to have the City use the simulations proved futile. The Mayor refused to provide additional funds for this proposal; he directed the Commission to expend such funds as it saw fit for this purpose from its own budget. The Commission had in its "Special Services" budget, from which testing costs were normally paid, sufficient funds to pay for the proposed video simulations. At trial it claimed—in an explanation the district court found "less than satisfactory"—not to have learned of these funds until too late.

Accordingly, the 1989 examination was administered with the traditional written and oral components. Under the Commission's affirmative action policy, the panels

conducting the oral tests should have included representatives of protected classes of candidates. Dr. Outtz also specifically recommended that the panels include minority examiners. Nonetheless, the panels that conducted the oral portions of the 1989 examination included no Blacks and no Hispanics. Though Bridgeport's assistant personnel director said—in testimony the court found "considerably less than convincing"—that minority panelists had been sought, Bridgeport's director of affirmative action testified that neither the Commission nor any other City official had asked him for assistance in recruiting any minority examiners.

B. *The Examination Results and the Proposed Methods of Selection*

The written test was administered on April 1, 1989, and the oral tests were conducted over a three-day period in June 1989. There were 170 candidates who took the examination, of whom 115 were White, 27 were Black, and 28 were Hispanic. Ninety-nine candidates received passing scores. Of the 99 who passed, 78 were White, 8 were Black, and 13 were Hispanic. Thus, approximately 68% of the White candidates passed the examination, while approximately 30% of the Black candidates and 46% of the Hispanic candidates passed. The combined minority candidate passing rate was 38%. The scores of the minority candidates who passed were clustered at the lower end of the range of scores, and the scores of the White candidates who passed were clustered at the high end. This was true whether one viewed the examination as a whole or analyzed separately its written and oral components. Shown graphically, the examination results were as follows:

Race of Candidate	Number Taking Exam	Number Passing	Percent Passing	Highest Rank
White	115	78	68%	1-19
Black	27	8	30%	20
Hispanic	28	13	46%	22

As indicated by the above chart, the highest scoring minority candidate ranked 20th; White candidates received the top 19 scores on the examination. As of August 1989, the City planned to make 19 promotions to the rank of sergeant. Plaintiffs urged the Commission not to make promotions from the list in rank order, in light of the adverse impact that would have on minority candidates. Dr. Outtz, in a letter to the Commission dated August 15, 1989, stated that "certain differences in test scores may not be significant," and he too recommended that the Commission not make promotions from the eligibility list in "strict rank-ordered fashion." He recommended that the Commission instead make its selections by using "banding," a technique that takes a range of scores whose differences are not statistically significant and, within that band range, provides for promotions of candidates on the basis of considerations such as race or ethnicity, gender, work experience, past job dependability, and other factors that the hiring authorities deem pertinent. In recommending banding, Dr. Outtz stated that the tests he had developed "cannot be justified as valid for the specific use of strict rank ordering."

The five-member Commission initially voted 2-0, with one member absent and two not voting, to use banding. This decision, however, was reversed a few days later by the full Commission, which decided by a 3-2 vote to

make promotions in strict rank order. Although the Commission's chairman testified at trial that he would have voted to use banding had he known that rank-order selection would have a disparate impact on minority candidates or would otherwise violate federal equal employment laws, he stated that prior to voting he and the other members of the Commission had not reviewed any analysis of the test results to determine whether rank-order selection would have such an impact. He also admitted that prior to voting he was aware that the Mayor had authorized funding for only 19 positions and that all 19 positions would go to White candidates.

C. *The District Court's Decision*

The district court ruled that plaintiffs had carried their burden of proving that the promotion process at issue here had a disparate impact on minorities, in violation of Title VII. It found, *inter alia*, that the scores of minority candidates were clustered disproportionately at the lower end of the range of scores, and that the probability of this pattern's occurring by chance was one in 10,000 in the case of Blacks and two in 10,000 in the case of Hispanics. In light of the statistical evidence of the examination's generally negative effect on minority candidates, the court found that plaintiffs had established a prima facie case that "the examination itself had a disparate impact on Black and Hispanic candidates, significantly and disproportionately reducing their promotional opportunities." 735 F. Supp. at 1130.

The court declined to find that the use of strict rank-order selection would cause additional disparate impact, and it found persuasive the justifications proffered by the City that use of the written and oral examination

components would serve legitimate employment goals. Though as of August 1989 the Commission had intended to promote only 19 candidates, the court found that as of March 1990 the City intended to promote the first 25 persons on the eligibility list at the conclusion of this litigation and that, over the course of the two-year period that the list was to remain in effect, the City anticipated making 7-14 additional promotions.

Nonetheless, since the examination itself had disparate impact, the district court proceeded to consider whether plaintiffs had adequately shown that there were alternative practices that could achieve the City's legitimate business goals with less adverse impact on minority candidates. Though rejecting plaintiffs' contention that the City was required to use the proposed video simulations, the court found that the use of banding would not impose any significant burden on defendants and would be a less discriminatory selection technique:

> While the Court accepts the proposition that rankings near the top of the promotion list indicate higher qualifications than those at the bottom of the list, lock-step reliance upon a system that promotes one person over another when the difference between their rankings is not statistically significant is unwarranted, particularly in a case where the examination that accounts for 95% of one's ranking on that list has been shown to disproportionately affect Blacks and Hispanics. Nor is the Court persuaded that uncertainty about the ultimate results of banding should preclude its implementation. Banding results in a more valid promotional procedure and may lead to the promotion of additional minorities. Finally, while it might seem

> anomalous to consider banding as an alternative selection device in light of the Court's conclusion that strict rank order promotions will not add to the disparate impact previously identified to have occurred, the use of banding is entirely justified to help overcome the disparate impact resulting from the examination itself. Plaintiffs have met their burden of proving that this alternative selection device will assist to offset the examination's disparate impact.

735 F. Supp. at 1137.

Accordingly, the court found that plaintiffs had proven a violation of Title VII, and it invited the parties to submit proposals for a banding remedy. In response, plaintiffs and the City submitted proposals for the construction of the bands and for the composition of panels to make selections from within the bands. The City, championing the reliability of the examination, urged adoption of a sliding five-point band, that is, upon promotion of a candidate, the band containing the next group of eligible candidates would be defined by the highest remaining score of any unpromoted candidate and all scores within five points of that score. The City urged appointment of a three-member selection panel consisting of (a) the chief of police or his designee, (b) the personnel director of Bridgeport or his designee, and (c) a Bridgeport citizen with a background in human resources and/or personnel management who was not employed by the City, to be appointed by the Mayor. Plaintiffs, persisting in their criticism of the reliability of the examination, urged adoption of a band width of 8.19 points. They proposed appointment of a four-member panel, three of whom would be senior police

officials, but none of whom could be residents of, or employed in, Connecticut; at least two panelists would be Black or Hispanic.

After receiving these submissions, the court, "tak[ing] into account . . . Dr. Outtz's overestimation of the reliability coefficient for the oral component of the examination as well as the plaintiffs' overly negative estimate of the same," Remedy Order dated August 10, 1990, at 2, adopted a middle approach. It ordered that a sliding band be used and that the band width be 6½ points. It ordered that selections from within each band be made by a five-member panel composed of (a) the Bridgeport chief of police or his designee; (b) the court-appointed special master who has overseen Bridgeport Title VII matters for some years; and (c) three police officers holding a rank of lieutenant or higher, none of whom resides in or is employed in Connecticut, and at least two of whom are Black or Hispanic. In making selections from within the band, the panel was directed to consider (1) the needs of the Department; (2) job dependability; (3) assignment history and job experience in the Department; (4) departmental or special skills training; (5) participation in law enforcement/management seminars and courses; (6) formal university education in law enforcement/management; (7) ability to interact with persons of diverse backgrounds; (8) the need to remedy the disparate impact upon Blacks and Hispanics resulting from the examination at issue; and (9) overall job performance.

A final judgment was entered accordingly, and these appeals by the City and the intervening defendants followed. Plaintiffs have not cross-appealed. The district

court stayed its Remedy Order during the pendency of the appeals.

II. DISCUSSION

On appeal, the City and the intervening defendants contend principally (1) that the district court erred in ruling that plaintiffs had (a) established a prima facie case of disparate impact, and (b) carried their ultimate burden of showing disparate impact; and (2) that even if disparate impact was properly proved, the court erred in ordering banding as a remedy. For the reasons below, we reject these contentions.

A. *The Ruling That the 1989 Examination Violated Title VII*

Title VII proscribes employment discrimination with respect to hiring or the terms and conditions of employment on the basis of, *inter alia*, race, color, or national origin. 42 U.S.C. § 2000e-2(a). Designed " 'to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees,' " *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)), Title VII prohibits not only overt and intentional discrimination, but also discrimination resulting from practices that are facially neutral but have "disparate impact," *i.e.*, significant adverse effects on protected groups, *see, e.g.*, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977); *Griggs v. Duke Power Co.*, 401 U.S. at 431.

Title VII also provides that

> [n]otwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice . . . for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(h). In contending that a test used to determine promotions violates Title VII's prohibition against racial discrimination, a plaintiff may establish a prima facie case of disparate impact by showing that use of the test causes the selection of applicants for promotion in a racial pattern that significantly differs from that of the pool of applicants. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. at 425; *see also Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989) ("*Wards Cove*"); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988). This showing may be made through statistical evidence revealing a disparity so great that it cannot reasonably be attributed to chance. *See, e.g., Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977) ("gross statistical disparities . . . may in a proper case constitute prima facie proof of a pattern or practice of discrimination"); *see also Castaneda v. Partida*, 430 U.S. 482, 496-97 & n.17 (1977) (using standard-deviation analysis); *Guardians Association v. Civil Service Commission*, 630 F.2d 79, 86 & n.4 (2d Cir. 1980) (same), *cert. denied*, 452 U.S. 940 (1981); EEOC Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4D

(adverse impact may be inferred where, assuming not too small a sample, the members of a minority group are selected at a rate that is less than four-fifths of the rate at which the majority group is selected). To establish a prima facie case, statistical disparities "must be sufficiently substantial that they raise . . . an inference of causation." *Watson v. Fort Worth Bank & Trust*, 487 U.S. at 995.

After the plaintiff has established a prima facie case, the employer has the burden of coming forward with evidence to show that the test has " 'a manifest relationship to the employment in question.' " *Albemarle Paper Co. v. Moody*, 422 U.S. at 425 (quoting *Griggs v. Duke Power Co.*, 401 U.S. at 432). If the employer can make such a showing, the plaintiff may nonetheless prevail if he can suggest alternative tests or selection methods that would meet the employer's legitimate needs while reducing the racially disparate impact of the employer's practices:

> If an employer does . . . meet the burden of proving that its tests are "job related," it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship."

Albemarle Paper Co. v. Moody, 422 U.S. at 425 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973)); *see also Wards Cove*, 490 U.S. at 660-61. Such proof would rebut a showing that the test was job related because a refusal to adopt such alternatives "would belie a claim by [the employer] that [its] incum-

bent practices are being employed for non-discriminatory reasons." *Id.* at 661.

The district court properly applied these principles in the present case. Under generally accepted statistical analysis, if a given pattern can be expected to occur at least five times out of 100 (*i.e.*, once in 20 times), it can reasonably be attributed to chance; a pattern of test results that would be expected to occur less often is considered to be statistically significant, *i.e.*, showing that it is unlikely that the pattern of results is mere coincidence. *See, e.g., Ottaviani v. State University of New York at New Paltz*, 875 F.2d 365, 371 (2d Cir. 1989) (statistical analysis yielding level of significance at or below .05 level is suspect), *cert. denied*, 110 S. Ct. 721 (1990). One of plaintiffs' experts evaluated the results of the 1989 examination using the Mann-Whitney test, which has been used in similar contexts, *see, e.g., Bryan v. Koch*, 492 F. Supp. 212, 220 (S.D.N.Y.) (Title VI claim), *aff'd*, 627 F.2d 612 (2d Cir. 1980); *Fritz v. Baker*, No. 87 Civ. 5662 (S.D.N.Y. Jan. 17, 1990) (1990 WL 3921) (age-discrimination claim), *aff'd without opinion*, 914 F.2d 239 (2d Cir. 1990). The Mann-Whitney analysis revealed that the 1989 examination resulted in a pattern that, comparing the scores of White candidates against Black candidates, would occur by chance only once in 10,000 times, and that, comparing the scores of White candidates against Hispanic candidates, would occur by chance only twice in 10,000 times. Given that an occurrence rate of anything less than once in 20 times is not reasonably attributable to chance, the court appropriately found that the pattern of the test scores here, whose occurrence rate was one in 10,000 and two in 10,000, had statistical significance.

The City and the intervening defendants challenge the court's reliance on this evidence. Noting that the Mann-Whitney analysis focuses on the distribution of all examination scores, they argue that the court should instead look solely at the City's plans for use of the eligibility list over its two-year life and should conclude that, because the City may promote a number of minorities during that two-year period, the examination did not have disparate impact. We reject this argument. The ranking of the candidates was itself the result of the disparate impact of the examination. Since the underlying goal of Title VII is to ensure "equality of *opportunity* and the elimination of discriminatory *barriers* to professional development," *Connecticut v. Teal*, 457 U.S. 440, 449 (1982) (emphasis in original), employers are not entitled to circumvent the statute's prohibition against use of racially discriminatory tests by merely showing that eventually they may hire some members of the disadvantaged minority group. *See id.* at 455-56.

We conclude that the district court properly took into account the entire range of scores generated by the 1989 examination. The evidence that the bunching of White candidates' test scores at the top of the scale and of minority candidates' test scores at the bottom could not be expected to occur by chance, along with the evidence that, *inter alia*, prior to announcement of the examination Dr. Outtz had tried to get the City to use video simulations precisely to eliminate the examination's anticipated adverse impact on minorities, and that prior to this litigation he advised the City that the examination "cannot be justified as valid for the specific use of strict rank ordering," provided more than adequate support for the district court's ruling that plaintiffs had established a prima facie case.

While the court ruled, and plaintiffs do not here contest, that the City proceeded to meet its task of showing that the examination was content valid and justified by the City's business needs, the court also properly ruled that plaintiffs had sufficiently rebutted that evidence by showing that the City could have chosen to use banding in order to alleviate the disparate racial effect of the examination without disserving its legitimate interests. The court properly rejected the general arguments of the intervening defendants that use of strict rank-order selection was required "as a matter of administrative regularity" or to "promote the public perception of fairness." It also properly rejected their contention that rank-order selection was required by the City's Charter, since municipal charter provisions cannot override the goals of Title VII, *see, e.g., Guardians Association v. Civil Service Commission*, 630 F.2d at 104. The City itself came forward with no persuasive evidence that the banding method could not serve its proper interests. Rather, Dr. Outtz testified that small variances in the scores on the 1989 examination did not indicate that there were real differences in the qualifications of the candidates. Thus, promotion of candidates from within designated bands of scores is as likely as rank-order promotions to select sergeants with the appropriate qualifications.

Finally, there was additional evidence to support the inference that the City's refusal to use banding and its determination to adhere to rank-order selection "belie a claim . . . that [its] incumbent practices are being employed for non-discriminatory reasons," *Wards Cove*, 490 U.S. at 661. That evidence included the facts that the City (a) failed to include minorities on the panels that conducted the oral part of the examination,

despite Dr. Outtz's recommendation that it do so and despite its own affirmative action plan's requirement that it do so; (b) rejected the initial recommendation of Dr. Outtz that it use video simulations in addition to the written test in order to avoid a disparate impact on minorities; (c) rejected this suggestion notwithstanding the availability of sufficient funds in its budget and notwithstanding the suggestion of the Commission's personnel director that expenditure of the funds for the race-neutral simulations would likely, considering the City's frequent past status as a Title VII defendant, save the City money in the long run; and (d) adopted strict rank-order promotions in the face of the express evaluation of the examination's creator that for such use the examination "cannot be justified as valid." Though the district court did not find that the City's failure to use the video simulations and its failure to include minority panelists were sufficient in themselves to establish Title VII liability, its finding that the City's explanations for these omissions were "less than satisfactory" and "considerably less than convincing" lends support to the inference that the City's adherence to rank-order promotion was pretext. That inference is particularly available in light of the City's insistence on strict rank-order selection at a time when it planned only 19 promotions and knew that the first 19 candidates were White and the 20th was Black.

In all the circumstances, we conclude that the district court properly ruled that the City's proposed use of its 1989 examination for promotions violated Title VII.

B. *The Remedial Order*

The challenges of the City and the intervening defendants to the district court's remedial order do not require extended discussion. Once a violation of Title VII has been established, the district court has broad, albeit not unlimited, power to fashion the relief it believes appropriate. The bounds of the court's discretion are set in part by Title VII's goals of preventing discrimination and achieving equal employment opportunity. *See, e.g., International Brotherhood of Teamsters v. United States*, 431 U.S. at 364; *Albemarle Paper Co. v. Moody*, 422 U.S. at 417; *Griggs v. Duke Power Co.*, 401 U.S. at 429-30. "Congress took care to arm the courts with full equitable powers" to enable them to fulfill their " 'duty to render a decree which will so far as possible eliminate the discriminatory effects' " of a discriminatory selection process. *Albemarle Paper Co. v. Moody*, 422 U.S. at 418 (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)).

At trial, Dr. Outtz testified that the use of banding would put some of the minority candidates in a better position to be considered for promotion, thus eliminating at least some of the disparate impact found to have been caused by the examination. Though this process doubtless will not aid the minority candidates whose scores are at the very bottom end of the scale, the banding remedy ordered by the district court provides some relief to other disadvantaged minority candidates by increasing at least the possibility that some of them will receive promotions. We thus reject defendants' contention that the remedy ordered was not within the court's discretion.

CONCLUSION

We have considered all of the arguments of the City and the intervening defendants on these appeals and have found them to be without merit. The judgment of the district court is affirmed.

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No. 91-344

In The

Supreme Court of the United States

October Term, 1991

BRIDGEPORT POLICE FOR EQUAL EMPLOYMENT OPPORTUNITY, INC., *et al.*,

Petitioners,

vs.

BRIDGEPORT GUARDIANS, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Did the District Court and the Court of Appeals correctly rule that a municipal employer violated Title VII when it administered a promotional examination which had a disparate impact and then refused to use a method of selecting candidates from the promotional list which would alleviate the disparate impact at no significant cost to the employer and with no effect on the quality of candidates to be promoted?

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This lawsuit is yet another chapter in the nearly twenty year history of employment discrimination litigation involving the Bridgeport Police Department.[1] This history of litigation has involved virtually all aspects of police department operations from hiring to working conditions and promotions. Incredibly, to the present day, no minority police officer has ever advanced beyond the permanent rank of lieutenant. Because of the pervasiveness of racial discrimination, the department has remained under the scrutiny of a court-appointed Special Master for nearly a decade. *Bridgeport Guardians v. DelMonte*, 553 F. Supp. 601 (D. Conn. 1982).

This action arose as a result of the 1989 Bridgeport police sergeant's examination and as a result of the manner in which the municipal defendants intended to use the examination to make promotions. Contrary to the assertion of the petitioners in their petition for certiorari, the 1989 sergeant's examination was *not* developed "under court supervision" (Petition for Certiorari, p. 1). It was developed by the municipal defendants' testing consultant, Dr. James Outtz. The examination consisted of a written test which comprised fifty-three percent of a candidate's total score and an oral test which comprised forty-two percent of a candidate's total score (the remaining five percent of the score was based on departmental seniority).

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1. *See, for example, Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 354 F. Supp. 778 (D. Conn. 1973), *aff'd in part*, 482 F.2d 1333 (2d Cir. 1973); *Members of Bridgeport Housing Authority Police Force v. City of Bridgeport*, 499 F. Supp. 760 (D. Conn. 1980); *aff'd in part and rev'd in part*, 646 F.2d 55 (2d Cir. 1981); *Dobosz v. DelMonte*, 509 F. Supp. 964 (D. Conn. 1981); *Bridgeport Guardians v. Delmonte*, 553 F. Supp. 601 (D. Conn. 1982); *Brown v. Bridgeport Civil Service Commission*, B 86-282 (D. Conn. 1986).

Dr. Outtz did not intend that the examination be used to make promotions in strict rank order based on candidates' examination scores. Because of the inherent inability of any examination to precisely measure a candidate's ability to perform a particular job, Dr. Outtz recommended that statistically insignificant differences in test scores be ignored and that a selection method known as "banding" be employed. Simply stated, banding treats candidates whose scores do not differ by a statistically significant amount as equally qualified. Promotions among equally qualified candidates are then made based upon their professional qualifications.

It is undisputed that Dr. Outtz informed the municipal defendants that the examination "cannot be justified as valid for the specific use of strict rank ordering." In spite of this unequivocal statement from its own expert, the City insisted that the promotions be made in strict rank order. The reason for this insistence became obvious and was the motivation for this lawsuit.

The initial promotions planned to be made from the promotional list numbered nineteen; the first nineteen candidates on the list were White; the twentieth candidate was Black. Thus, the City's refusal to follow the instructions of its own testing consultant would have led to the promotion of nineteen Whites and no minorities. When the City announced that banding would not be used, the respondents initiated this action.

The City argued at trial that the nineteen promotions were merely the first round of promotions and that some other hypothetical number of promotions might be made from the list. This argument loses much if not all of its weight in light of recent events: the City has attempted to declare bankruptcy and, at the same time, the Mayor announced that up to one hundred police officers from a police force of approximately 350 officers could be laid off. Thus, these hypothetical numbers of promotions have

been shown to be of little value in assessing the disparate impact of the examination.

The respondents charged that the examination and its use resulted in a disparate impact on minority candidates. At trial, the respondents demonstrated the extent of the disparity. Unrefuted statistical evidence introduced by the respondents showed that minority candidates clustered at the bottom range of examination scores while White candidates clustered at the top range of scores. The respondents' expert, Dr. Alan Gelfand, the only trained statistician to testify at trial, explained that the clustering of White candidates among the top scores and minority candidates among the bottom scores was of extreme statistical significance. In fact, the probability that such a clustering could occur by chance was one in 10,000 for Black candidates and two in 10,000 for Hispanic candidates (probabilities of less than one in twenty are statistically significant).

The petitioners conspicuously fail to mention these one in 10,000 and two in 10,000 probabilities in their petition. They also mischaracterize the statistical test used by the respondents' expert, Dr. Gelfand. Contrary to the petitioners' assertion, the Mann-Whitney test used by Dr. Gelfand does not compare merely the average scores of all candidates. Rather, it compares the distribution and ranking of all scores to determine the probability that such a skewed clustering of scores could occur by chance. As the courts correctly found, the Mann-Whitney test was the most powerful and most appropriate measure of the disparate impact of the examination.

There is no question that the promotional examination disproportionately reduced (or eliminated) the opportunity of promotion for minority candidates. This reduction in opportunity was the focus of the case. However, the trial court also noted with disapproval, as did the Court of Appeals, two other facts.

First, in spite of the requirements of its own Affirmative Action Plan, the City assembled a panel of twenty-seven oral examiners which included not a single minority examiner. Second, in addition to rejecting Dr. Outtz's instructions to use banding, the City also rejected his recommendation of an alternative form of examination using video simulations which the City recognized as being "virtually race neutral," even though funds were available to pay for this examination.

After trial, the District Court ordered that the City use banding to select candidates for promotions and ordered the parties to submit proposals setting forth the manner in which banding should be carried out. In subsequent proceedings, the court specified the manner in which banding would be implemented, following in large measure the proposals submitted by the respondents and the City.

It is significant to note that the intervening defendants (an organization of White police officers) who initiated the petition for certiorari have not challenged the manner in which the banding procedure will be implemented. This is especially significant in light of their repeated invocation of the unsupportable allegation that banding is synonomous with quotas. It is simply a misstatement of fact to suggest that banding involves quotas. The District Court explicitly rejected the use of quotas. Further, the City of Bridgeport, which will be responsible for implementing banding, has decided not to appeal the decision of the Court of Appeals. Thus, the only issue on appeal is whether the City was justified in rejecting banding when it knew that the use of the examination in strict rank order was an invalid use of the examination and that the use of banding could alleviate the disparate impact of the examination without affecting the quality of candidates chosen for promotion.

REASONS FOR DENYING THE WRIT

There are two reasons why the petition for certiorari should be rejected. First, the Court of Appeals did not "misread" the decisions of this Court and absolutely did not approve the use of quotas, as the petitioners claim. Second, the facts of this case are unique to Bridgeport and to this examination and do not raise an issue which warrants review by this Court.

I.

The Court of Appeals correctly applied the law.

Contrary to the petitioners' assertion, there is no conflict between the decisions of this Court as applied by the Court of Appeals. The petitioners assert that the Court of Appeals "misread" *Connecticut v. Teal,* 457 U.S. 440 (1982) to create a conflict with *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989). This is simply incorrect.

The Court of Appeals cites *Connecticut v. Teal* only once, to stand for the unassailable proposition that the "underlying goal of Title VII is to ensure 'equality of *opportunity* and the elimination of discriminatory *barriers* to professional development.' " *Bridgeport Guardians v. City of Bridgeport,* 933 F.2d 1140, 1147 (2d Cir. 1991) (emphasis in original). The court continued, noting that "employers are not entitled to circumvent the statute's prohibition against use of racially discriminatory tests by merely showing that *eventually* they *may* hire some members of the disadvantaged minority group." *Id.* at 1147-48 (emphasis added).

The sole issue in this case involves promotional *opportunities.* The courts were confronted with an examination process which unfairly favored White candidates; examination results which left

minority candidates with minimal opportunity for promotion; and the City's rejection of an alternative selection method which was fair to everyone, which was recommended by the City's own testing consultant, and which provided equally qualified candidates for promotion. Not surprisingly, the trial and appellate courts reached the conclusion that the City should use the examination as it had been instructed to use it by the City's own testing consultant.

It is important to note that, as the District Court found, the use of banding does not guarantee promotions to minority candidates. Instead, it found merely that "Banding results in a more valid promotional procedure and *may* lead to the promotion of additional minorities." *Bridgeport Guardians v. City of Bridgeport,* 735 F. Supp. 1126, 1137 (D. Conn. 1990) (emphasis added).

This case fits precisely within the standards set forth by this Court in its decisions from *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975) to *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989). In *Wards Cove,* this Court reiterated the following standard which it noted was first set forth in *Albemarle:*

> If respondents, having established a prima facie case, come forward with alternatives to petitioners' hiring practices that reduce the racially disparate impact of practices currently being used, and petitioners refuse to adopt these alternatives, such a refusal would belie a claim by petitioners that their incumbent practices are being employed for nondiscriminatory reasons.

Wards Cove, id. at 660-661.

This is precisely what was proved in this case. After establishing a *prima facie* case, respondents came forward with

an alternative to the City's practice — banding instead of strict rank order promotions. Banding was shown to reduce the racially disparate impact of the examination yet the City refused to adopt banding. Further, the City's own testing consultant recommended banding because it would result in a more valid promotional process with no effect on the quality of candidates being promoted.

Petitioners simply stretch beyond reason when they attempt to manufacture a conflict between *Teal* and *Wards Cove*. For example, they illogically suggest that, because *Teal* involved a pass/fail test, it is not applicable to this case and that it conflicts with *Wards Cove*. However, the petitioners are then forced to admit that *Teal* and *Wards Cove* do not conflict if *Teal* is applied to cases in which "bottom line racial balance is raised in defense of specific discriminatory practices" (Petition at p. 5). This is precisely the manner in which the Court of Appeals applied both *Teal* and *Wards Cove* to reject the City's bottom line defense.

Further, as subsequent events have demonstrated, the City's bottom line defense was faulty. Based on a hypothetical number of promotions, the bottom line defense crumbles in light of the City's financial situation which may jeopardize its ability to promote even the first nineteen candidates on the list.

Finally, the petitioners make the incredible and incorrect assertion that the Court of Appeals "held that individuals could make a prima facie case without showing any disparate impact on the group to which they belong." (Petition, p. 6). Petitioners inexplicably ignore the facts: the unrefuted evidence was that the probability that the enormous disparity in scores of minority and White candidates occurred by chance was one or two in 10,000. The entire point of the trial was that minority candidates were disproportionately disadvantaged, as a group, by the test and its use in strict rank order. Both the District Court and the Court of Appeals found this to be the case.

II.

The facts do not create a significant issue.

The facts of this case do not warrant review of the issue presented by the petitioners. The petitioners state the issue to suggest that there is no disparate impact because the employer's decision, (*i.e.*, the promotions) did not produce a statistically significant disparate impact. As described above, the employer's hypothetical promotions have proven to be nothing more than hypothetical in light of the City's bankruptcy filing. The examination disproportionately reduced the promotional opportunities of minority candidates. Therefore, it had a disparate impact and the City's refusal to use banding to alleviate this disparate impact demonstrated the pretextual nature of its justifications for using the examination in strict rank order.

The question presented, as stated by the petitioners, misstates the facts so dramatically that it becomes an issue not raised by this case. Disparate impact was not measured using "mean exam scores." At the time the litigation was initiated, nineteen promotions were planned; by the time of trial, twenty-five were purportedly planned; at present, it is not possible to know whether any promotions will occur in light of the City's financial condition. The City used the examination in a manner which was invalid, refusing to follow the instructions of its own expert, which resulted in an enormous disparate impact on promotional opportunities. Finally, and most significantly, the City of Bridgeport has decided not to appeal the decision of the Court of Appeals. These facts hardly raise a question of such significance as to warrant review by this Court.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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